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No. 98-568

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# In The Supreme Court of the United States

OCTOBER TERM, 1998

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KENNETH R. HILLIARD and
GREGORY D. STYLES, Trustees under
Trust Agreement dated May 5, 1979,

*Petitioners,*

v.

SHELL WESTERN E & P, INC.,
a Delaware corporation,

*Respondent.*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented is argumentative and contains misrepresentations of fact. The Petition appears to present two questions:

1) Whether Michigan's law of res judicata bars a claim that the same Plaintiffs could have raised in an earlier suit between the same parties and involving the same transaction.

2) Whether the royalty interest owner is responsible for paying the Michigan statutory fee on its share of produced oil and gas.

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## COUNTER STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' Statement of "Constitutional and Statutory Provisions Involved" consisted of constitutional provisions that have never been involved in this case. The only pertinent statutory provisions are the following Michigan statutes:

> **MCLA §319.22 Fee for monitoring, surveillance, enforcement, and administration of act**
>
> Sec. 22. (1) For the Purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the department of treasury in the same manner, at the same time and subject to all the provisions of the tax levied by Act No. 48 of the Public Acts of 1929, being sections 205.301 to 205.317 of the Compiled Laws of 1970.

MCLA §205.301. **Severance tax on oil or gas**

> Sec. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax.

MCLA §205.312(2). **Persons, producers; defined**

> "Producer" as used in this act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance. . . . .

## COUNTER STATEMENT OF THE CASE

From 1981 through 1986, Petitioners were Plaintiffs in a state court action against Respondent in which they claimed damages for allegedly improper deductions from their royalty checks. In 1984, Petitioners' class was certified and, by a consent judgment, they settled their claims concerning all royalty check deductions except the deduction for their pro-rata share of state severance taxes (Michigan Compiled Laws §2-5/3-1 et seq). The Michigan trial court had already ruled that petitioners were "producers" and therefore subject to the state severance tax. The severance tax issue was reserved out of the settlement to allow Petitioners to pursue their appellate rights. The trial court's ruling was upheld on appeal. Brown, et al v Shell Oil Co., 128 Mich App 867 (1983) reh. Den.;

appeal denied 424 M 867 (1986) cert denied 479 US 824 (1986).

In this case, Petitioners again claimed damages for allegedly improper deductions from their royalty checks. This time, Petitioners alleged that their claim was limited to the propriety of deducting their pro rata share of the state statutory fee. (MCL §319.22(1)). Although Petitioners were informed of this deduction from royalty checks during the course of the Brown, et al litigation, they elected not to challenge that specific deduction. Although Petitioners were free to raise this specific issue at any time during the Brown et al suit, they did not make a specific claim regarding the statutory fee. In 1984, Petitioners' broad claims were resolved by entry of a consent judgment.

Petitioners filed this action in Michigan state court. Because Petitioners included a RICO claim

under federal law (18 USC §1341), Respondent removed the case to the United States District Court for the Western District of Michigan. In its first responsive pleading, Respondent moved to dismiss the Petitioners' claim for two primary reasons. First, Respondent contended that the new claim was barred by Michigan's law of res judicata because the claim arose out of the same transaction as was involved in Brown, et al and because Petitioners could have raised the specific statutory fee claim during the Brown, et al litigation. Second, Respondent contended that the statutory fee was subject to the same provisions as the Michigan severance tax and was therefore partly the responsibility of the royalty interest owner just as the severance tax was.

The District Court rejected Respondent's arguments and entered a judgment in favor of

Petitioners for breach of contract (the federal RICO claims were dismissed). Respondent appealed the judgment to the Sixth Circuit Court of Appeals. Because the issues in this case were purely questions of Michigan law, the Sixth Circuit certified the two issues to the Michigan Supreme Court. The Michigan Supreme Court declined the request.

The Sixth Circuit reversed the District Court's rulings on both res judicata and statutory interpretation. The Court ruled that Petitioners' claims were barred by res judicata because they arose out of the same transactions as were at issue in Brown, and Petitioners could have raised the claims in the earlier suit. The Court also ruled that royalty interests such as Petitioners were subject to the statutory fee because the statute provided that the fee was to be administered

under the provisions of Act 48 (severance tax) and Act 48 clearly included royalty interests within its scope.

The Opinion of the Sixth Circuit was unpublished because it was not precedential.

## ARGUMENT

I. This case involved purely State Questions that should not be entertained in this Court.

US Sup. Ct. Rule 10 provides that certiorari is a matter of jurisdictional discretion and will be granted "only for compelling reasons". Respondent contends that this case is woefully lacking in special or important reasons for the discretionary exercise of jurisdiction. The decision below was a plainly correct application of State law to the unique facts of this case. No federal questions were involved, no conflict among

the circuits is alleged, and the Sixth Circuit even elected not to publish its opinion because it is not precedential.

US Sup. Ct. Rule 10 further provides that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Respondent contends that the Petition for Writ of Certiorari in this case raises primarily allegations of erroneous factual findings, making this case inappropriate for this Court's exercise of discretionary jurisdiction.

As noted by the Sixth Circuit in its Opinion and in its Order Certifying Questions to the Supreme Court of Michigan, this case was controlled by two issues of State law. Petitioners newly coined constitutional challenge was never properly an issue in this case and, if Petitioners desire to challenge the

constitutionality of Michigan's statutory fee, they should direct such a claim against the State of Michigan in another action.

Since the Sixth Circuit applied Michigan's res judicata rules to this case and determined whether Petitioners were subject to the statutory fee, this Court should decline to exercise its discretionary jurisdiction.

> ". . . [The] question whether or not the . . . . interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the constitution of the United States, and which therefore we have no right to review. "Moffit v Kelly, 218 US 400, 405 (1910); Nickel v Cole, 256 US 222 (1921).

The remainder of this brief addresses the specific arguments raised in Petitioners' Petition.

## II. Petitioners are not entitled to a Writ of Certiorari

### A) Because Petitioners could have raised their claim in their prior suit against Respondent, res judicata bars them from raising it now.

In Argument I of their Petition, Petitioners argue that the decision of the Sixth Circuit deprived them of due process because it gave res judicata effect to the earlier litigation titled Brown, et al v Shell. Petitioners' arguments in this regard are unfounded and false.

The Sixth Circuit correctly recognized that Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that Plaintiff could have brought but did not, as well as those questions that were actually litigated.

The Plaintiffs in this case were also Plaintiffs in the Brown, et al v Shell, class action, which litigated numerous claims concerning proper deductions from royalty checks. Therefore, the Sixth Circuit correctly concluded that the final resolution of Brown. et al v Shell barred Plaintiffs in this case from bringing claims arising out of their royalty interests which were or could have been litigated in Brown.

Plaintiffs' arguments that they could not have raised their current claim in the earlier litigation is nothing more than a mischaracterization of the facts that does not warrant this Court's jurisdiction. Contrary to Plaintiffs' assertion, the Brown, et al v Shell suit was not limited to named class representatives and the class was free to raise the current statutory fee claim had it desired. Unlike this Court, the Sixth Circuit had the benefit of a complete factual record which included the

order certifying the Plaintiff Class in Brown, et al v Shell, and the voluminous pleadings filed by the class, including a revision of the claims made by the class that was filed shortly before the consent judgment was entered.

Respondent contends that Plaintiffs in this case were members of the Plaintiff Class in Brown, et al v Shell and that they were able to bring their current statutory fee claim in Brown had they desired since such a claim arose out of the same transaction as was at issue in Brown. The Sixth Circuit agreed with these facts when it applied res judicata to preclude Plaintiffs from raising the statutory fee claim now. This Court should not grant certiorari, simply because Plaintiffs disagree with the factual findings of a lower court.

B) The Sixth Circuit's interpretation of Michigan statutory law was correct.

Petitioners argue that the Sixth Circuit incorrectly interpreted the Michigan statute and that this alleged misinterpretation of the Michigan Statute constitutes a denial of due process. However, the Sixth Circuit's interpretation of the Statute was correct and, regardless, Petitioners do not allege how the interpretation of the Statute supposedly impairs their due process rights.

The fee-imposing portion of Act 61 provided: "For the purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the Department of Treasury in the same manner, at the same time and subject to all provisions of the tax levied by [Act 48.]" MCLA § 319.22(1) (emphasis added)

Act 61 provides no other guidance regarding the collection of this statutory fee. However, Act 48 provides that the fee is levied upon each "producer" and then defines "producers" to include the royalty interests. (See Sixth Circuit analysis at pages 28a to 34a of Petitioners Appendix).

The Sixth Circuit engaged in a logical analysis to reach a proper interpretation of the Michigan statute. Absolutely nothing about the Sixth Circuit's analysis of this statute deprived Petitioners of due process.

C) The Sixth Circuit did not deprive Petitioners of an opportunity to pursue constitutional claims.

Petitioners claim that the Sixth Circuit's interpretation of the Michigan statute creates an argument that the statute is unconstitutional. Petitioners then claim that they were denied Due

Process because the Sixth Circuit did not remand the case to the District Court to consider the constitutionality of the Michigan Statute.

Although Respondent disputes Petitioners' assertion that the statutory fee is unconstitutional, this case is not an appropriate vehicle for Petitioners to challenge the statue's constitutionality. Petitioners have always been free to institute an action against the State of Michigan if they believe the statutory fee to be unconstitutional.

Respondent, in fact, shares Petitioners' status as a "producer" and payor of the statutory fee and is not genuinely adverse to Petitioners on this issue. See United States v Johnson, 319 US 302 (1942) Respondent does not "impose" the fee and is no more a guarantor of the constitutionality of the fee than is the mortgagee bank that "pays" property taxes imposed on

mortgagor land owners. If Petitioners truly believe that the fee is unconstitutional, they should seek complete relief in another action.

## CONCLUSION AND RELIEF REQUESTED

Petitioners have utterly failed to demonstrate the "compelling reasons" for exercising this Court's discretionary jurisdiction. This case involves no federal constitutional issues, it is a simple case of applying unique facts to a proper interpretation of State law. The decision of the Sixth Circuit is rationally supported by clear statutory provisions and well-reasoned state court rulings. Disappointed in the outcome below, Petitioners have attempted to revise the facts and manufacture new arguments in an attempt to get "one more bite of the apple". That is not this Court's function and the Petition for Writ of Certiorari should be denied.

WHEREFORE, Respondent Shell Western E&P Inc. respectfully requests this Court to deny the Petition for Writ of Certiorari.

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